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**Issue Date: 27 March 2014**

Case No.: 2011-SCA-00002

*In the Matter of:*

WAGE AND HOUR DIVISION,
Complainant,

v.

GARCIA FOREST SVC, LLC &
SAMUEL GARCIA AND FLOR GARCIA,
(individuals),
Respondent.

## DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act 41 U.S.C. § 6701 *et seq.* ("SCA"), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 *et seq*. ("CWHSSA") and regulations issued pursuant to those statutes, 29 C.F.R. Parts 4, 6. The SCA sanctions those who are awarded a federal contract and subsequently fail to (1) pay the required wages, (2) award minimum fringe benefits, or (3) keep adequate records, by barring them from receiving federal contracts for a period of 3 years. CWHSSA requires contractors and subcontractors on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.

The Administrator, Wage and Hour Division, U.S. Department of Labor ("WHD") filed a complaint against the Respondent, Garcia Forest Service L.L.C. ("Garcia Forest") alleging violations of the SCA and CWHSSA. A hearing was held in Charlotte, North Carolina on December 11 and 12, 2012, and both parties filed post-hearing briefs.[1]

## BACKGROUND

Respondent Garcia Forest is a firm providing forest management service. Its principal place of business is in Rockingham, North Carolina. The majority of its work is performed under contract with the U.S. Forest Service, an agency of the Department of Agriculture. It primarily uses the H-2B visa program to recruit and employ foreign guest workers to perform seasonal work under its contracts. The two individual respondents named in the complaint are Samuel Garcia, who owns and manages the company, and his wife Flor Garcia.

[1] The following citations are used in this opinion: T: Transcript pages; CX: Complainant's Exhibit number; RX Respondent's Exhibit number.

## INVESTIGATION OF THE TOFTE AREA CONTRACT

In 2007, Garcia Forest entered into contract No. AG-63A9-07-0001 (CX 2) for reforestation services, such as planting seedlings and clearing brush in the Superior National Forest in Minnesota. The contract specified an hourly rate of $10.98 for brush thinning and $9.14 for tree planting, with a $3.01 hourly rate for fringe benefits. (T. 78-79)

WHD conducted an investigation of this contract. Two investigators, Kristin Tout and Corey Walton, went to the Tofte area of the forest to examine documentation and interview crew members on June 21, 2007.

The contract provided for the workers to be paid on an hourly basis, with additional pay for fringe benefits, overtime, and holiday pay. Mr. Garcia decided to pay the Tofte area crew on a production basis. He testified that he made this decision to provide an incentive for the crew, because work began late in the season and he was unsure whether the work could be completed on time without that incentive. (T. 24) His niece, Veronica Garduño Garcia, handled payroll and he directed her to pay the workers on a production basis, but to ensure that the amount that they were paid was at least as much as they would be owed for hourly work at the contract rate. (T. 24-25)

Mr. Garcia resorted to the production rate because of his concerns about finishing the work on this contract on time. None of his other crews, including crews working in the same forest at the same time, have been paid on a production basis. (T. 52-53) Noting that different workers performed tasks at different rates of speed, he determined on a production pay rate that he believed to be equivalent to what a "low average" worker would produce. (T. 32) Based on this assumed rate, his intention was that a worker with "low average" production for a week would be paid the amount warranted by his actual work hours, while a higher producing worker would be paid more.

Ms. Tout and Mr. Walton interviewed the crew leader, Flavio Hernandez, and workers of the Tofte crew. Their initial interviews were confusing, because Mr. Hernandez stated that the crew was paid on an hourly basis, while the crewmembers said that they were being paid on a production basis. In hopes of clarifying the matter, they requested payroll records.

Mr. Hernandez testified in a deposition that he kept records of each worker's production in a notebook. In order to implement production pay for the Tofte crew, Mr. Hernandez provided Ms. Garduño Garcia with both the production figures and the hours worked for each man. (CX 14 pp. 27-32) From this information, she created separate spreadsheets in order to compare the production and hourly earnings (T. 278-279). She testified that she took the actual hours recorded by Mr. Hernandez and multiplied that by the contract rate, adding in the appropriate amount for fringe benefits, overtime, and holiday hours. (T. 287-292, 302-305)

If a worker's production earnings as reported by Mr. Hernandez exceeded the earnings based on the reported actual hours, Ms. Garduño Garcia calculated that worker's pay based on the higher production earnings. She created payroll checks using the company's electronic

payroll system, which was not set up to calculate pay on a production basis. To pay a worker for production, she had to add hours to the worker's time until it covered the higher production earnings. (T. pp. 283-284)

Ms. Garduño Garcia would then give Mr. Hernandez a figure for the number of hours to be recorded for each member of the crew because as he testified, "the ones that produced more had to be given more hours." (CX 14, p. 28) The hourly records were adjusted in order to report production wages as if they were being paid on an hourly basis.

Ms. Garduño Garcia was not aware that if the workers were paid on a production basis she needed to add in fringe benefit, overtime, and holiday pay separately. She believed that holiday pay was covered by adding in hours to each crewmember's pay for the week of a holiday before comparing it to his production earnings. (T. 323-325)

During their field interviews, the two investigators had noted the inconsistency between what Mr. Hernandez and the crew members said about the pay system. The manipulation of reported hours became clearer on their review of the payroll records, in particular the weekly time sheets.

The crew's normal workweek, subject to weather, was from Sunday to Friday. The time sheet for the week following the investigators' visit (CX 4, p. 49) is illustrative. It shows 11 crewmembers, each with identical work hours from Sunday through Thursday. On Friday, June 29, 2007, the individual members are listed with the same start time and a range of stop times from 10:15 A.M. to 7:30 P.M. Based on those times, the men were credited with from 3 hours 15 minutes to 12 hours of work that day. Time sheets for other weeks during the summer followed a similar pattern, with identical work hours for the earlier days of the week and widely divergent numbers of hours recorded on Friday.

Ms. Tout and Mr. Walton knew from their interviews that the workers all lodged together in the same hotel and all travelled to and from the worksite together in the same vehicle. In spite of all arriving and departing the job site together, they were credited with wildly inconsistent hours of work in a regular weekly pattern. It was clear from this that the time sheets had been manipulated to make it appear that they were being paid on an hourly basis. (T. 116-121)

Ms. Tout's attempt to reconstruct accurate hourly records was impeded by several factors. Mr. Hernandez discarded his handwritten notes after calling in the information at the end of each workweek. (T. 60-61, CX 14, p 27) In addition, Ms. Garduño Garcia testified that the computer on which she kept the two sets of spreadsheets calculating production and hourly pay crashed. Attempts to recover the data from the hard drive were unsuccessful. (T. 322) Therefore neither the raw data on actual hours of work (i.e. Mr. Hernandez' notes) nor the electronic spreadsheets incorporating that information were available. There were no surviving records of the actual hours worked. The only records that were available were the "constructive" hours that Ms. Garduño Garcia created for the acknowledged purpose of misrepresenting work hours in order to pay the crew members on a production basis.

Using the limited data available, Ms. Tout calculated estimated work hours and back pay due for each crew member. (T. 128-137, CX 7) When she discussed her calculations with Mr. Garcia he questioned some matters, such as non-working days resulting from weather conditions. After further adjustments for the estimated weather days, he agreed to pay the back pay that Ms. Tout had calculated. (T. 140-142, CX 8)

Concerning her analysis of the pay data Ms. Tout testified that

> I determined that for one, the hours that had been reported had not been accurate, but by having paid production that the payment had not included the required fringe benefits, the payment had not included the required halftime premium under CWHSSA and that the payments have not covered subsequent or additional pay for those work weeks in which holidays occurred, that the payment that the workers earned was strictly based on either how many trees they planted or how many acres they cleared.
>
> Q Why can't an employer pay the wages, benefits and overtime in a lump sum?
>
> A The regulations specifically state that the fringe benefits that would be required under the Act have to be recorded separately and stated separately in the record. In addition, holiday pay is a benefit to something extra. If an individual works on a particular holiday, they have to be paid their wages plus up to eight hours in the form of holiday pay and overtime pay cannot be rolled into a production rate. That's also a separate requirement.

T. 124-125.

## EARLIER INVESTIGATION

WHD had earlier conducted an investigation of Garcia Forest Service covering three contracts during the period 2005-2006. (T. 105, RX 4) The WHD determined that Garcia Forest had failed to pay holiday pay under three Federal contracts. The investigator in that earlier case held a conference with the company in March, 2007. (T. 105-107) In the report of the conference the investigator wrote:

> This WHI [Wage and Hour Investigator] also explained the debarment process. It was explained that the criteria included willfulness or non-inadvertence of violations, falsification, repeat violations, refusal to comply or pay back wages and employer attitude and motives, etc. This WHI also stated that investigations of an employer showing any of these criteria may be recommended for debarment. Mr. Garcia stated that he hopes that the firm would not be recommended for debarment.

> The undersigned told Mr. & Mrs. Garcia that in the future if they had any questions, to contact this WHI at the Charlotte District Office.

RX. 4, p. 10.

Mr. & Mrs. Garcia exhibited good faith and cooperation throughout the investigation. Once the law and regulations were explained, they complied fully and made the calculated payments of back pay. Based on this, the investigator in the 2007 investigation recommended that the file be closed on an administrative basis. This was done and there were no debarment proceedings in that case.

## DISCUSSION

The back wages calculated by the investigators have been paid, so the only remaining issue is debarment from future contracts.

It appears that the violations that have led to this case began with a sincere concern over the ability to complete the contract on time and a good faith attempt to provide an incentive to the workers. The unrebutted evidence is that only the Tofte crew was put on a production pay system. In addition, Mr. Garcia promptly paid the back pay amounts that the investigators had calculated. Given the lack of accurate records neither he nor the investigators could be sure of the figures arrived at, but he chose not to dispute them.

Since neither the contract nor the payroll software was designed for a production-based pay system, the decision to implement one for the Tofte crew had to be improvised. As the summer wore on, it required more and more tinkering until the jury-rigged system spiraled out of control. When WHD investigators interviewed the Tofte crew they found the workers and the leader disagreeing about how they were being paid. Further investigation led to finding the obvious falsification of the hourly records, with different workers having wildly divergent hours reported for the last day of the week, for several weeks running.

## LEGAL STANDARD FOR DETERMINING DEBARMENT

Under a more forgiving legal regimen, the good faith with which this appears to have started might justify more lenient sanctions. However, the Service Contract Act requires debarment unless the high standard of "unusual circumstances" is met. 41 U.S.C. § 354(a); 29 C.F.R. § 4.188(a).

Under the Act, "any person or firm found . . . to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances." 29 C.F.R. § 4.188(a); 41 U.S.C. § 354 The Secretary's discretion to grant such relief is constrained, making "unusual circumstances" only a limited safety valve to an otherwise strict statute. *See* 29 C.F.R. § 4.188(b)(2)*; R & W Transp., Inc*., ALJ No. 2003-SCA-024, ARB No. 06-048, slip op. at 8 (ARB Feb. 28, 2008) (the debarment provision "is a particularly unforgiving provision of a demanding statute. A contractor seeking an 'unusual circumstances' exemption from debarment must, therefore, run a narrow gauntlet.").

While debarment is a severe penalty, Congress intended that it be the norm for violating contractors as opposed to the exception. *Summitt Investigative Service, Inc. v. Herman*, 34 F. Supp.2d 16, 19 (D.D.C. 1998)*; see also Vigilantes, Inc. v. U.S. Dep't. of Labor*, 968 F.2d 1412, 1418 (1st Cir. 1992) ("only the most compelling of justifications should relieve a violating contractor from that sanction.")

The existence of "unusual circumstances," is determined on a case-by-case basis, "in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1) Negligence or ignorance of contract provisions cannot excuse violations, nor can belatedly paying amounts owed under the Act and promising to comply better in future. 29 C.F.R. § 4.188(b)(1)-(2); *KSC-Tri Systems USA, Inc.*, ALJ No. 2006-SCA-20 (ALJ Aug. 7, 2007). "Debarment is designed to break down a chain of non-compliance and to force employers to take the labor regulations seriously," restricting the award of government contracts to only responsible bidders. *Hugo Reforestation, Inc.*, ALJ No. 1997-SCA-20, ARB No. 99-003, slip op. at 13 (ARB Apr. 30, 2001) (internal citation and quotation omitted); 29 C.F.R. § 4.188(b)(6). Only in cases where the violation is shown to have been minor and inadvertent, can relief be granted. 29 C.F.R. § 4.188(b)(2); *see Fed. Food Serv., Inc. v. Donovan*, 658 F.2d 830, 834 (D. C. Cir. 1981) ("we do not suggest that a 'pure heart' and a lack of willfulness are sufficient to show unusual circumstances," only that the "use of debarment against innocent and petty violations was not intended.")

The regulations place the burden of establishing the existence of "unusual circumstances," squarely on the violator. 29 C.F.R. § 4.188(b)(1). In fact, "debarment is presumed once violations of that Act have been found, *unless* the violator is able to show the existence of 'unusual circumstances' that warrant relief from SCA's debarment sanction." *Hugo*, ARB No. 99-003, slip op. at 8-9 (emphasis added). To show "unusual circumstances," the violator must establish the "absence of aggravating factors and the presence of mitigating factors." See 29 C.F.R. § 4.188(b)(3)(i)-(ii); *Dantran, Inc. v. U.S. Dep't. of Labor*, 171 F.3d 58 (1st Cir. 1999). This has developed into a three-part test, which the violator must satisfy every stage of to be eligible for relief from debarment. *Hugo*, ARB No. 99-003, slip op. at 13.

In essence, the first stage of this test requires showing that the violations were not ones the contractor can be considered culpable for, as culpable (let alone intentional) violations are aggravating factors that require debarment. 29 C.F.R. § 4.188(b)(3)(i). In this case, the Respondent's foreman misled the investigators during their initial interviews. Later, the investigators encountered obviously falsified hourly work records. Even accepting, as I do, that the misrepresentation began with a good faith effort to incentivize the workers with more pay for more work, this conduct alone would make it difficult to find that the Respondents had satisfied the very high "unusual circumstances" standard.

Evidence of serious prior violations also places the contractor beyond the range of relief, since presumably the past citations put them on notice of their obligations under the Act. 29 C.F.R. § 4.188(b)(3)(i); *KSC-Tri Systems*, ALJ No. 2006-SCA-20, slip op. at 30; *Hugo*, ARB No. 99-003, slip op. at 11 (violations were culpable "given [employer']s history of violations, his repeated opportunities to learn and abide by the law, and his failure to do so when he knew what was required"). This is expressly the case here, where the Respondents were put on notice of the

risk of debarment, and advised that they could seek advice from the WHD, at the conference after the investigation earlier that same year.

In the second stage, the contractor must establish the following mitigating prerequisites to relief: "[a] good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii).

If both of the initial steps are satisfied, a more diffuse set of considerations are weighed in the third step. These include: "the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees," whether the contractor had been investigated for violations in the past, and whether current liability "was dependent upon resolution of a bona fide legal issue of doubtful certainty." 29 C.F.R. § 4.188(b)(3)(ii). Failure at any point of this test ends the analysis, without the need to consider the remaining steps. *Hugo*, ARB No. 99-003, slip op. at 13. As already noted, the firm had recently been investigated and warned of the necessity of compliance. Further, there was no "legal issue of doubtful certainty" at issue in the violations. Mr. Garcia knew that the contract called for hourly pay and chose to switch the Tofte crew to a production-based pay system.

## FINDINGS RELATING TO GARCIA FOREST L.L.C. AND SAMUEL GARCIA

I find that Respondents Garcia Forest Service, L.L.C. and Samuel Garcia are responsible parties. They violated the SCA and CWHSSA by failing to pay the minimum wage and fringe benefits, including holiday pay; by failing to maintain accurate pay and time records; and by failing to pay the proper overtime rate. I further find that they have not demonstrated unusual circumstances that could relieve them from the sanction of debarment.

## FINDINGS RELATING TO FLOR GARCIA

Flor Garcia is the wife of Samuel Garcia. As is the case in many small family-owned businesses, she would occasionally help out with administrative and clerical work. However, she did not deal with the payroll. When Ms. Garduño Garcia was unavailable, Mr. Garcia handled the payroll work himself. (T. 20-21) Ms. Garcia did sign the checks for the back pay calculated by Ms. Tout. (T. 142) However, this involved mere compliance with the findings of the investigation rather than any computations or substantive decisionmaking on her part.

Ms. Tout did not interview Ms. Garcia in the course of the investigation, and she was not included in the post-investigation conference between Ms. Tout and Mr. Garcia. (T. 163-164).

Articles of Organization dated January 19, 1995 (CX 9) reflect that Garcia Forest Service is a North Carolina Limited Liability Company. Samuel and Flor Garcia are both listed on that document as Member Organizers of the company.

The implementing regulations extend liability to "parties responsible" for a violation:

> The term *party responsible* for violations in section 3(a) of the Act is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the

> same principles are applied under both Acts. An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company. [citations omitted]

29 C.F.R. §4.187(e)(1).

> It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in §4.6, but includes all persons, irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached. [citations omitted]

29 C.F.R. §4.187(e)(4).

Based on her intermittent administrative work, and lack of evidence of her active management of contract performance, employment policies, or other activities giving rise to violations, I find that Flor Garcia is not a "party responsible" for violations in this case.

## ORDER

Garcia Forest Service L.L.C. and Samuel Garcia are hereby **DEBARRED** from receiving government contracts for a period of three years from the date of this Order. Pursuant to 41 U.S.C. § 354(a), the Secretary will forward the Respondents' names to the Comptroller General, as required by the Act.

Digitally signed by Kenneth Krantz
DN: CN=Kenneth Krantz, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

Kenneth A. Krantz
Administrative Law Judge

KAK/mrc

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative

Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).